Supreme Court, U.S.
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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

CONCHO RESIDENTIAL SERVICE, INC., Petitioner

VS.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER,

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On Petition For Writ Of Certiorari to the Court Of Appeals, Third Supreme Judicial District, at Austin, State of Texas, No. 03-98-00022-CV

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Corporate Disclosure Statement: Concho Residential Service, Inc., a Texas corporation ("CRS"), is not owned by a parent corporation and no publicly held company owns 10% or more of CRS' stock. CRS owns stock in Oxford Square, Inc., a Texas corporation, that is not publicly held.

Excerpts, Community MHMR Center Enabling Act
Tex. Rev. Civ. Stat. Ann. art. 5547-203
(1988 Vernon Supp.)

Art. 5547-203 Community centers for mental health and mental retardation services

Agencies authorized to establish and operate community center; contracts

Sec. 3.01 (a) Local agencies which may establish and operate community centers are a county, a city, a hospital district, a school district, or any organizational combination of two (2) or more of these. When community centers are established by an organizational combination, the governing bodies of such organizational combination shall enter into a contract between or among them which shall stipulate whether the board of trustees shall consist of not less than five (5) nor more than nine (9) members selected from the governing bodies of the organizational combination, or of not less than five (5) nor more than nine (9) members to be appointed from the qualified voters of the region to be served. This contract may be renegotiated or amended from time to time as necessary to change the method of establishing a board of trustees.

(b) As used in this Act, a "community center" may be:

(1) a community health center, which provides mental health services;

(2) a community mental retardation center, which provides mental retardation services; or

(3) a community mental health and mental retardation center, which provides mental health and mental retardation services.

(c) A community center is an agency of the state, a governmental unit, and a unit of local government as defined and specified by Chapters 101 and 102, Civil Practice and Remedies Code, and a local government as defined by Section 3, The Interlocal Cooperation Act (Article 4413(32c), Vernon's Texas Civil Statutes).

(d) A community center may not be established unless the region to be served by the center contains a population of at least two hundred thousand (200,000), according to the most recent federal census.

....

Sec. 3.05 (a) The board of trustees is responsible for the administration of community centers.

(b) The board of trustees shall develop policies consistent with the rules, regulations, and standards of the Department.

(c) The board of trustees shall standardize qualifications for personnel positions for the community center consistent with those developed by the Commissioner in Subsection (f) of Section 2.12 of this Act.

....

Sec. 3.09 Each participating local agency may contribute lands, buildings, facilities, personnel and funds for the administration of the various programs and services of a community center.

....

Excerpts,
Texas Free Enterprise & Antitrust Act of 1983
Tex. Bus. & Com. Code §15.01 et seq. (West 1994)

§15.01. Title of Act

This Act shall be known and may be cited as the Texas Free Enterprise and Antitrust Act of 1983.

§15.02. Applicability of Provisions

(a) The provisions of this Act are cumulative of each other and of any other provision of law of this state in effect relating to the same subject. Among other things, the provisions of t his Act preserve the constitutional and common law authority of the attorney general to bring actions under state and federal law.

(b) If any of the provisions of this Act are held invalid, the remainder shall not be affected as a result; nor shall the application of the provision held invalid to persons or circumstances other than those as to which it is held invalid be affected as a result.

§15.03. Definitions

Except as otherwise provided in Subsection (a) of Section 15.10 of this Act, for purposes of this Act:

(1) The term "attorney general" means the Attorney General of Texas or any assistant attorney general acting under the direction of the Attorney General of Texas.

(2) The term "goods" means any property, tangible or intangible, real, personal, or mixed, and any article, commodity, or other thing of value, including insurance.

(3) The term "person" means a natural person, proprietorship, partnership, corporation, municipal corporation, association, or any other public or private group, however, organized, but does not include the State of Texas, its departments, and its administrative agencies.

(4) The term "services" means any work or labor, including without limitation work or labor furnished in connection with the sale, lease, or repair of goods.

(5) The terms "trade" and "commerce" mean the sale, purchase, lease, exchange, or disribution of any goods or services; the offering for sale, purchase, lease, or exchange of any goods or services; the business of insurance; and all other economic activity undertaken in whole or in part for the purpose of financial gain involving or relating to any goods or services.

§15.04. Purpose and Construction.

The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

§15.05. Unlawful practices

(a) Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.

(b) It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce.

[(c) through (f) are not reproduced in this Appendix]

(g) Nothing in this section shall be construed to prohibit activities that are exempt from the operation of the federal antitrust laws, 15 U.S.C. Section 1 et seq., except that an exemption otherwise available under the McCarran-Ferguson Act (15 U.S.C. Sections 1011-1015) does not serve to exempt activities under this Act. Nothing in this section shall apply to actions required or affirmatively approved by any statute of this state or of the United States or by a regulatory agency of this state or of the United States duly acting under any constitutional or statutory authority vesting the

agency with such power.

[(h), (i) are not reproduced in this Appendix]

§15.20 Suits by Injured Persons or Governmental Entities

(a) Suit to Recover Damages.

(1) Any person or governmental entity, including the State of Texas and any of its political subdivisions or tax-supported institutions, whose business or property has been injured by reason of any conduct declared unlawful in Subsection (a), (b), or (c) of Section 15.05 of this Act may sue any person, other than a municipal corporation, in district court in any county of this state in which any of the named defendants resides, does business, or maintains its principal office or in any county in which any of the named plaintiffs resided at the time the cause of action or any part thereof arose and shall recover actual damages sustained, interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment (the rate of such interest to be in accordance with Texas law regarding postjudgment interest rates and the amount of interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances), and the cost of suit, including a reasonable attorney's fee; provided, however, that if the trier of fact finds that the unlawful conduct was willful or flagrant, it shall increase the recovery to threefold the damages sustained and the cost of suit, including a reasonable attorney's fee; provided that interest on actual damages as specified above may not be recovered when recovered damages are increased threefold.

[(b) through (c) are not reproduced in this Appendix]

NO. CV92-0444-B

CONCHO RESIDENTIAL SERVICE, INC., Plaintiff,	§	IN THE DISTRICT COURT
	§	OF
v.	§	TOM GREEN COUNTY, TEXAS
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As A Purported Community And Its Capacity As A Mental Retardation Authority; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE,TOM GREEN COUNTY, CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, and HALE COUNTY	§	119TH JUDICIAL DISTRICT

ORDER GRANTING HALE COUNTY'S
MOTION FOR SUMMARY JUDGMENT

BE IT REMEMBERED, that on the 2nd day of August, 1995, came on to be considered Defendant Hale County's previously filed Motion for Summary Judgment. The Court, having considered the pleadings and evidence in support of summary judgment, together with argument of counsel, is of the opinion that Hale County should be granted summary judgment.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Summary Judgement be rendered in favor of Hale County, Texas, and and that plaintiff Concho Residential Service, Inc. be denied all relief against Hale County, Texas. All relief requested and not expressly granted is denied. SIGNED this 11th day of Sept. 1995.

/s/

HONORABLE ROYAL HART

NO. CV92-0444-B

CONCHO RESIDENTIAL SERVICE, INC., Plaintiff,	§	IN THE DISTRICT COURT
	§	OF
v.	§	TOM GREEN COUNTY, TEXAS
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, ET AL	§	119TH JUDICIAL DISTRICT

FINAL SUMMARY JUDGMENT FOR TOM GREEN COUNTY

On May 28, 1996, came on to be heard the Motion for Summary Judgment of Defendant, TOM GREEN COUNTY, TEXAS ("TOM GREEN COUNTY") in the above styled and numbered cause. The parties appeared by and through their respective attorneys of record and announced ready for hearing whereupon the Court noted that the Motion was made in proper form and time, proper service has been made upon the Plaintiff, and the Plaintiff has been properly notified of the hearing of same, all in accordance with Rule 166a of the Texas Rules of Civil Procedure. The Court, after examining the pleadings and summary judgment evidence and hearing the argument of counsel, determines that TOM GREEN COUNTY is entitled to summary judgment upon the Plaintiff's entire case against TOM GREEN COUNTY.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that summary judgement be rendered in favor of TOM GREEN COUNTY upon the Plaintiff's case in its entirety against TOM GREEN COUNTY; and, accordingly, that Plaintiff, CONCHO RESIDENTIAL SERVICES, INC., take nothing against Defendant, TOM GREEN COUNTY, and that said Defendant recover all costs incurred on its behalf from Plaintiff. All relief not expressly granted is denied.

SIGNED on May 28, 1996.

/s/

HONORABLE ROYAL HART

NO. CV92-0444-B

CONCHO RESIDENTIAL SERVICE, INC., Plaintiff,	§	IN THE DISTRICT COURT
	§	OF
v.	§	TOM GREEN COUNTY, TEXAS
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As A Purported Community And Its Capacity As A Mental Retardation Authority; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE,TOM GREEN COUNTY, CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, and HALE COUNTY	§	119TH JUDICIAL DISTRICT

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

On the 2nd day of August, 1995, came on to be heard the First Amended Motion for Summary Judgment filed by Defendants MHMR Services for the Concho Valley a/k/a Concho Valley Center for Human Advancement, in its capacity as Community MHMR Center and its capacity as Mental Retardation Authority, James Young, Joe Fin, Karen Sheppard, the Texas Council of Community MHMR Centers, Inc., Spencer McClure,

and Central Plains Center for MHMR and Substance Abuse. After reviewing the pleadings, motions, and evidence on file, and after hearing the argument of counsel, the Court finds that Defendants' First Amended Motion for Summary Judgment is meritorious and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' First Amended Motion for Summary Judgement is hereby GRANTED as to all of Plaintiffs' claims arising under the Texas Free Enterprise and Antitrust Act of 1983, which includes all claims in Plaintiff's Second Amended Original Petition except for the tortious interference claim set forth in Sections XXVI-XXXI (paragraphs 26.01 through 31.03) and the injunction claims on p.63(8), and also includes all claims in Plaintiff's Third Amended Original Petition except for the tortious interference claim set forth in Sections XXVI-XXXI (paragraphs 26.01 through 31.03) and the injunction claim set forth in Section 32.02 and 32.03, and p. 62(8), and that Plaintiff shall take nothing as against Defendants for any such causes of action arising under the Texas Free Enterprise and Antitrust Act of 1983.

SIGNED this 29th day of Oct. 1996.

/s/

HONORABLE ROYAL HART
JUDGE PRESIDING

NO. CV92-0444-B

CONCHO RESIDENTIAL SERVICE, INC., Plaintiff,	§	IN THE DISTRICT COURT
v.	§	OF TOM GREEN COUNTY, TEXAS
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority, And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER	§	119TH JUDICIAL DISTRICT

Defendants.

FINAL SUMMARY JUDGMENT

CAME ON for consideration:

I.

1. On July 25, 1997, the Court heard and considered the following, with all parties appearing by and through their respective counsel:

a. Defendants' Restated and Amended Motion for Summary Judgment and Conditional Motion to Sever by MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its Capacity As Community MHMR Center and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, John Brubaker, The Texas Council of Community MHMR Centers, Inc., Spencer McClure, Texas Council Risk Management Fund, Board of Trustees of The Texas Council Risk Management Fund, as Trustee of the Liability Trust Account, Brian Crews, JI Specialty Services, Inc., Central Plains Center for MHMR and Substance Abuse; and Richard Hall, Hector Cantu, James Coffey, Ruby Guttierez, Sheirran Hughes, Brenda Morris, Jacqueline Shannon, and Roger Sidener;

b. Defendants' Addendum to Restated and Amended Motion for Summary Judgement and Conditional Motion to Sever by MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its Capacity As Community MHMR Cente and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, John Brubaker, The Texas Council of Community MHMR Centers, Inc., Spencer McClure, Texas Council Risk Management Fund, Board of Trustees of The Texas Council Risk Management Fund, as Trustee for the Liability Trust Account, the Property Trust Account, and the Workers' Compensation Trust Account, Brian Crews, JI Specialty Services, Inc., Central Plains Center for MHMR and Substance Abuse; and Richard Hall, Hector Cantu, James Coffey, Ruby Guttierez, Sheirran Hughes, Brenda Morris, Jacqueline Shannon, and Roger Sidener;

c. Defendants' Motion for Leave to File Defendants' Reply Regarding Pending Summary Judgment Motions by MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its Capacity As Community MHMR Center and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, John Brubaker, The Texas Council of Community MHMR Centers, Inc., Spencer McClure, Texas Council Risk Management Fund, Board of Trustees of The Texas Council Risk Management Fund, as Trustee of the Liability Trust Account, the Property Trust Account, and the Workers' Compensation

Trust Account, Brian Crews JI Specialty Services, Inc., Central Plains Center for MHMR and Substance Abuse; and Richard Hall, Hector Cantu, James Coffey, Ruby Guttierez, Sheirran Hughes, Brenda Morris, Jacqueline Shannon, and Roger Sidener;

d. Defendants' Reply Regarding Pending Summary Judgement Motions by MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its As Community MHMR Center and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, John Brubaker, The Texas Council of Community MHMR Centers, Inc., Spencer McClure, Texas Council Risk Management Fund, Board of Trustees of The Texas Council Risk Management Fund, as Trustee of the Liability Trust Account, the Property Trust Account, and the Workers' Compensation Trust Account, Brian Crews JI Specialty Services, Inc., Central Plains Center for MHMR and Substance Abuse; and Richard Hall, Hector Cantu, James Coffey, Ruby Guttierez, Sheirran Hughes, Brenda Morris, Jacqueline Shannon, and Roger Sidener; and

e. Tom Green County's Supplemental Motion for Summary Judgement with Supporting Authorities;

f. Tom Green County's Second Supplemental Motion for Summary Judgement (including the First Supplemental Affidavit of Judith Hawkins, filed contemporaneously therewith on July 3, 1997).

g. Tom Green County's Reply re: Pending Motion for Summary Judgement;

h. Tom Green County's Motion for Leave to File Additional Summary Judgement Proof;

i. Defendant's, City of San Angelo, Motion for Summary Judgement;

j. Defendant's, The City of San Angelo, First Supplemental Motion for Summary Judgement; and

k. Defendant's The City of San Angelo, Second Supplemental Motion and Reply to Plaintiff's First Response to Defendant's, City of San Angelo, Motion for Summary Judgement.

2. Also on July 25, 1997, and immediately before taking up consideration of the other summary judgement matters described in paragraph 1, above, the Court considered the following motions, with all parties represented by counsel:

a. The Defendants' Motion for Leave to File Defendants' Reply Regarding Pending Summary Judgement Motions (identified in

Paragraph 1(c), above) and Tom Green County's Motion for Leave to File Additional Summary Judgement Proof (identified in Paragraph 1(h), above); and, finding that those Motions were well taken, the Court granted them by separate Orders entered in this cause.

b. The Plaintiff's Omnibus Motion Regarding Second Round of Defendants' Summary Judgement Motions; and finding the Motion lacking in merit, except in part, denied the motion (except in part) by its separate Order Denying Plaintiff's Omnibus Motion Regarding Second Round of Defendants' Summary Judgment Motions signed December 19, 1997; but as confirmed by that separate order, the seven page "Contract for Mental Retardation Services" attached thereto was made part of the Summary judgment record on Plaintiff's designation and was considered by the court at the July 25, 1997, hearing on the summary judgment motions described in paragraph 1, above.

3. Subsequent to July 25, 1997, the following items were filed, made part of the summary judgment record on Plaintiff's designation, and considered by the Court in connection with the motions described in paragraph 1, above:

a. Defendant's, The City of San Angelo, Second Amended Responses to Plaintiff's First Amended Written Interogatories; and

b. Defendant's, The City of San Angelo, Second Amended Responses to Plaintiff's Second Request for Production.

4. The Court notes that it has previously, prior to July 1997, rendered interlocutory summary judgments, as follows:

a. A Final Summary Judgment for Tom Green County dated May 28, 1996, disposing of all claims pending against Tom Green County as of that date;

b. An Order Granting Partial Summary Judgment for Defendants MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its As Capacity as Community MHMR Center and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, The Texas Council of Community MHMR Centers, Inc., Spencer McClure and Central Plains Center for MHMR and Substance Abuse dated October 29, 1996, disposing of all claims arising under the Texas Free Enterprise and Antitrust Act of 1983; and

c. An Order Granting Hale County's Motion for Summary Judgment for Defendant Hale County dated September 15, 1995, disposing of all claims pending against that defendant.

5. Since July 25, 1997, the following have also been filed and are before the Court for consideration:

a. Motion for Nonsuit of Counterclaims by Defendants/Counterplaintiffs HMR Services for the Concho Valley, James Young, Joe Finn, Karen Sheppard, The Texas Council of Community MHMR Centers, Inc., Spencer McClure and Central Plains Center for MHMR and Substance Abuse;

b. Motion for Nonsuit of Counterclaim by Defendant/Counterplaintiff John Brubaker;

c. Motion for Nonsuit of Counterclaims by Defendants/Counterplaintiffs Texas Council Risk Management Fund, Board of Trustees of Texas Council Risk Management Fund as Trustee of the Liability Trust Fund Account, Brian Crews, and JI Specialty Services, Inc.;

d. Notice of Nonsuit by Tom Green County Re: Its DTPA Counterclaim; and

e. Motion for Non-Suit of Counterclaims by Defendent/Counterplaintiff, City of San Angelo.

II.

The Court has considered all the motions for nonsuit (identified in paragraph 5 if Part I, above) and determined that they should be granted. Accordingly, IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the above referenced requests for Nonsuit are GRANTED and that all Counterclaims of Defendants/Counterplaintiffs are hereby nonsuited without prejudice to the rights of Defendants/Counterplaintiffs to refile same.

The Court has also considered all motions for summary judgment identified above (including all replies and responses thereon), the pleadings, the summary judgment evidence (including the matters referenced in paragraphs 2a, 2b, 3a and 3b of Part 1, above) the briefs and arguments of counsel, and finds that there is no genuine issue of material fact and that the remaining Defendants (namely, all Defendants except Hale County, to whom summary judgment has previously been granted) are entitled to judgment as a matter of law on all claims raised by Plaintiff in this suit. Accordingly,

IT IS FURTHER ORDERED, ADJUDGED and DECREED that a Final Summary Judgment be, and is hereby, GRANTED as to all causes of action asserted by Plaintiff against the above referenced Defendants; that Plaintiff takes nothing by this suit; and that this Final Summary Judgment

disposes of all remaining claims (that is, claims not disposed of by the earlier interlocutory summary judgments described in paragraph 4, above) against all Defendants herein.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all costs of court expended or incurred in this cause are taxed against Plaintiff, for which let execution issue.

All relief requested and not expressly granted herein is denied.

SIGNED this the day of December 19 , 1997.

/s/

JUDGE PRESIDING

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED AUGUST 26, 1999

NO. 03-98-00022-CV

CONCHO RESIDENTIAL SERVICE, INC., Appellant

V.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority, And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER,Appellees.

APPEAL FROM 119TH DISTRICT COURT OF TOM GREEN COUNTY BEFORE JUSTICES JONES, KIDD AND PATTERSON AFFIRMED IN PART; VACATED AND DISMISSED IN PART-- OPINION BY JUSTICE JONES

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court

that there was no error in the trial court's summary judgment EXCEPT as to the rendition of judgment with respect to appellant's seeking to enjoin Concho Valley from future membership in the Texas Council: IT IS THEREFORE considered, adjudged and ordered that the portion of the summary judgment with respect to Concho Residential Services, Inc. taking nothing by its request for injunctive relief is vacated, and judgment is rendered dismissing that claim. The remainder of the summary judgment is affirmed.

It is FURTHER ordered that the appellant, Concho Residential Services, Inc., pay all costs relating to this appeal, both in this Court and the court below; and that this decision with a copy of the opinion herein delivered be certified below for observance.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-98-00022-CV

CONCHO RESIDENTIAL SERVICE, INC., Appellant

V.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority, And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER, Appellees.

FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 119TH JUDICIAL DISTRICT NO. CV92-0444-B, HONORABLE ROYAL HART, JUDGE PRESIDING

Appellant Concho Residential Services, Inc. ("CRS") sued appellees MHMR Services for the Concho Valley (Concho Valley) and 22

others[1] for damages and injunctive relief, alleging multiple statutory and common-law causes of action. The trial court rendered summary judgment that CRS take nothing, disposing of all causes of action against all appellees. CRS perfected this appeal. We will affirm in part and dismiss the cause in part.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves the expansive legislative scheme for providing mental health and mental retardation services to the citizens of Texas. The Texas Department of Mental Health and Mental Retardation ("TDMHMR") and other governmental entities operating under its direction shoulder the responsibility of providing the administration and delivery of mental health and mental retardation services to the public. *See* Tex. Health & Safety Code Ann. §§ 531.001-615.002 (West 1992 & Supp. 1999) A key element in the statutory scheme is the establishment of mental health and mental retardation community centers, which provide the needed services to mentally disabled persons at a local level under the supervision of TDMHMR. These community centers are created by local governmental entities such as counties, municipalities, or hospital districts, or a combination of entities joining together. *See id* § 534.001. Community centers are, by statutory definition, "an agency of the state, a governmental unit, and a unit of local government." *Id.*

Also key in the statutory scheme is the creation of Mental Health or Mental Retardation Authorities ("MRAs"). MRAs are selected by TDMHMR and contract directly with the agency. It is the duty of the MRA to ensure that the statutorily mandated services are provided in its designated service area and to oversee state-funded community-based services. *See id.* §§ 534.052-.070. MRAs, in turn, work with community centers, as well as private entity providers of mental retardation and mental health services. Each MRA acts as the referral center for MHMR services in its service area.

At all times relevant to this suit, CRS was a for-profit provider of residential facilities and services to mentally retarded persons. Concho

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[1]There are 23 named appellees in the appeal, generally referred to collectively as appelleess. As necessary, we will refer to appellees individually by name.

Valley was both a community center and a designated MRA.

Although CRS asserted numerous claims against the various appellees, the crux of CRS's complaint is that Concho Valley and several of its employees allegedly blocked potential client's access to CRS's residential facilities. CRS alleges that Concho Valley conspired with the City of San Angelo and Tom Green County-the local governmental creators of Concho Valley - to limit CRS's business; alternatively, CRS argues that the City of San Angelo and Tom Green County are vicariously liable for Concho's conduct. CRS also sought an injunction prohibiting ConchoValley from being a member of the Texas Council, a nonprofit corporation made up of community centers from all around Texas. The remaining appellees are asserted to be either directly liable for their participation in the conspiracy and other fraudulent acts, or derivatively liable due to their association with Concho Valley or the Texas Council.

DISCUSSION

CRS presents sixteen issues for this Court's review. The first complaints generally that the tiral court erred in granting summary judgment disposing of all of its causes of action against all appellees.[2] Issue two concerns the trial court's denial of CRS's request for injunctive relief. Issues three through six assert error related to the trial court's refusal to grant a default judgment against Tom Green County. Issue seven asserts generally that the trial court erred in dismissing the claims against Hale County. Issue nine addresses CRS's claims brought under the Deceptive

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[2] The trial court rendered the following orders: (1) summary judgment for Tom Green County dated May 28, 1996, disposing of all claims against the county; (2) summary judgment for Concho Valley, Young, Finn, Sheppard, Texas Council, McClure, and Central Plains dated October 29, 1996, disposing of all claims arising under the Texas Free Enterprise Antitrust Act; (3) summary judgment for Hale County dated September 15, 1995, disposing of all claims against the County; and (4) final summary judgment dated December 19, 1997, disposing of all claims against all defendants.

Trade Practices-Consumer Protection Act ("DTPA").[3] The tenth and eleventh issues concern federal claims for violation of the Racketeer Influenced Corrupt Organizations Act ("RICO")[4] and "section 1983."[5] Issue twelve complains of the trial court's disposal of various common-law claims. Issue thirteen asserts error related to the dismissal of CRS's statutory claims grounded in the Persons with Mental Retardation Act of 1977.[6] Issue fourteen generally contends that the court erred in disposing of the vicarious liability claims against Central Plains. The final two issues complain of procedural rulings by the trial court.

Antitrust Liability

CRS asserted claims under Texas Free Enterprise and Antitrust Act of 1983 ("Antitrust Act" or "Texas Act")[7] against Concho Valley; Concho Valley Employees Finn, Sheppard, Young; Tom Green County; the Texas Council; McClure (Council director); and Central Plains, a community center and member of the Council. CRS argues that the named appellees violated the Antitrust Act by conspiring to restrict the access of potential clients from CRS's services. The appellees respond that their conduct is "immunized from antitrust liability by exemptions derived directly from the Texas Antitrust Act and from federal laws incorporated by the Act." We agree.

The purpose of the Antitrust Act is to promote economic competition in commerce in Texas. *See* Tex. Bus. & Com. Code Ann. § 15.04 (West 1987). As such, the restraint of trade or commerce is made

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[3] *See* Tex. Bus. & Com. Code Ann. § 17.46 (West 1987 & Supp. 1999).

[4] *See*18 U.S. C.A. § 1961 (West 1984 & Supp. 1999).

[5] *See* 42 U.S.C.A § 1983 (West 1994 & Supp. 1999).

[6] *See*18 Tex. Health & Safety Code Ann. §§ 591.001-.025 (West 1992 & Supp. 1999)

[7] Tex. Bus. & Com. Code Ann. §§ 15.01-.52 (West 1987 & Supp. 1999).

unlawful. See *id.* § 15.05(a). The 1983 Act was meant to be a major reform and modernization of Texas antitrust law and is modeled after the federal Sherman Antitrust Act and Clayton Act. *See Caller-Times Publishing Co. V. Triad Communications, Inc.*, 826 S.W.2d 576, 579-80 (Tex. 1992). The Texas Act explicitly states that its provisions "shall be construed...in harmony with federal judicial interpretations of comparable federal antitrust statutes...." Bus. & Com. Code § 15.04. It is to one of these federal judicial interpretations that we now turn.

Since 1943, the United States Supreme Court, in interpreting federal antitrust statutes, has recognized that antitrust laws do not apply to anti-competitive restraints imposed "as an act of government." *Parker v. Brown*, 317 U.S. 341, 352 (1943). *Parker* involved a marketing program adopted pursuant to the California Agricultural Prorate Act governing the 1940 California raisin crop. Brown, a producer of raisins, complained that the program violated the Sherman Act. The Court rejected this contention, relying on principles of federalism and state sovereignty, holding that the Sherman Act should be interpreted as a prohibition on individual, not "state action." *Id.* At 352. Because the program was not the product of a private agreement or combination by others in restraint of trade, it did not violate the Sherman Act. *Id.* at 351. The Court stated: "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Acet did not undertake to prohibit." *Id.* at 352. Because the Texas Act specifically adopts federal judicial interpretation of federal antitrust law, we are bound to apply the *Parker* state action exemption to the Texas Act. *See* Bus. & Com. Code § 15.04.

Texas has chosen to regulate the health and welfare of its mentally challenged citizens through a comprehensive statutory scheme, rather that leaving the availability of services to the marketplace. We believe this regulation fits squarely within the *Parker* exemption for an "act of government by the State as sovereign." *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 365, 370 (1991) (confirming Sherman Act does not apply to anti-competitive restraints imposed by states as an act of government). As in *Parker*, Texas has not entered into a conspiracy to restrain for-profit entities from providing services to mentally challenged persons. Rather, the state has decided to pursue a policy of replacing competition with regulation.

The statutory scheme charges TDMHMR with governing

the state policies concerning mentally disabled persons. In turn, local community centers are created to carry out the state's policies, with extensive oversight b TDMHMR. By definition, community centers are agencies of the state. *See* Health & Safety Code § 534.001. As state agencies engaging in acts of government by the state, these centers enjoy antitrust immunity under the state-action exemption. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 360-62 (1977); *Benton, Benton & Benton v. Louisiana Pub. Facilities Auth.*, 897 F.2d 198,,199,203 (5th Cir. 1990).[8] We conclude that the *Parker* state-action exception is applicable to statutorily created state agency community centers such as Concho Valley and Central Plains.

Furthermore, the individuals Finn, Sheppard, and Young, as employees of Concho Valley, also enjoy the benefits of the *Parker* state-action exemption. The state-action doctrine applies equally to the officers and agents of the governmental body who participate in the challenged conduct. *See Foley v. Alabama State Bar*, 648 F.2d 355,359 (5th Cir. 1981) (citing *City of Lafayette*, 435 U.S. 389). We hold the trial court did not err in disposing of CRS's antitrust claims against these individuals.

Similarly, the Texas Council and its director McClure enjoy the benefits of the *Parker* state-action doctrine. State-action immunity extends to private persons and entities taking a role in implementing state policy of always using the same law firm as bond counsel. Attorneys from a law firm not selected sued both the agency and the chosen private attorneys, alleging antitrust violations. The court found that not only was the agency protected by the state-action exemption, the private attorneys selected to perform services for the public agency were also shielded by the doctrine. *See id.*

In the instant case, the summary judgment evidence shows that the Texas Council is created and governed by its community center membership for the sole purpose of performing services for the center in their endeavors to provide services to mentally challenged Texans. Accordingly, the Texas Council and its agent McClure and entitled to the state-action exemption.

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[8] This is to be contrasted with municipalities, which are not themselves sovereign, and therefore carry a higher burden to demonstrate that their anti-competitive actions are authorized by the state pursuant to the state's policy to replace competition with regulation. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40-42 (1985).

We hold that the trial court did not err in disposing of CRS's antitrust claims against Texas Council and McClure.

Finally, CRS asserted antitrust claims against Tom Green County. Because the County is also exempt form antitrust liability, this claim fails. The federal Local Government Antitrust Act of 1984 expressly immunizes all local governmental entities from antitrust liability under the Clayton Act. *See* 15 U.S.C.A. § § 34-36 (West 1997). Counties are included in the definition of "local government". *Id.* § 34. As noted previously, the purpose of the Texas Act was to drastically reform Texas antitrust law to mirror federal antitrust law. *See Caller-Times*, 826 S.W.2nd at 579-80. The legislature explicitly adopted federal judicial interpretations of comparable federal antitrust statutes, and further provided that nothing in the Antitrust Act should be "construed to prohibit activities that are exempt from the operation of the federal antitrust laws." *See* Bus. & Com. Code § § 15.04, 15.05(g). We believe these expressions of the legislature incorporate the local government exemption for counties contained in the Local Government Antitrust Act. Further, as previously noted, the Texas Act also includes its own state-action exemption, which we conclude is expansive enough to cover the County's participation in the anti-competitive scheme. *See id.*§ 15.05 (g). Accordingly, we hold that the trial court did not err in dismissing CRS's antitrust claims against Tom Green County.

Lawfully Formed community Centers

As will be made clear later in this opinion, CRS's causes of action for DTPA violations, RICO violations, and common-law torts are premised on its assertion that Concho Valley and Central Plains are not legally constituted community centers and thus are not governmental entities entitled to sovereign immunity. Accordingly, we turn to the threshold issue of the community centers' legitimacy.

1. Failure for Lack of Contract

Concho Valley and Central Plains were established in June 1966 and July 1967, respectively, pursuant to article 3 of the Mental Health and Mental Retardation Act ("MHMRA") as enacted in 1965. See Act of April 5, 1965, 59th Leg., R.S., ch. 67, § 1, 1965 Tex. Gen. Laws 165, 171 (since repealed and codified as amended at Health & Safety Code Title VII). Section 3.01 of the MHMRA, as it existed at the community centers' creation, provided:

> One or more cities, counties, hospital districts, school districts, rehabilitation districts, state-supported institutions of higher education, and state-supported medical schools, or any combination of these, may cooperate, negotiate, and contract with each other through their governing bodies to establish and operate a community center.

Id.

It is undisputed that the creating entities of Concho Valley and Central Plains did not enter into written contracts to establish the two community centers. CRS urges this Court to read the above-quoted language to *require* a written contract as a prerequisite to the valid establishment of the community center. We decline to do so.

We read section 3.01, as written in 1965, to allow the joint creation and operation of a community center by cooperation, negotiation, or contract between local governmental entities. Clearly, the legislature meant to *authorize* the creation of community centers by means of contract. It appears that the legislature may have anticipated these local entities were likely to enter into contracts when forming joint community centers. However, there is nothing to indicate that the entities were *required* to form a written contract, or that the failure to do so would *invalidate* the legal existence of a jointly formed community center.[9]

Even assuming, however, that the version of section 3.01 applicable in 1967 could somehow be construed to require a contract in the formation of a community center, the record shows that in 1967 the creating entities of Central Plains did enter into a written agreement governing the selection of trustees for the center. In November 1989, the sponsoring local government creators of Concho Valley adopted written procedures setting forth, among other things, the selection of trustees, as required by the

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[9] We note that section 3.01 was amended in 1969 to *require* the governing bodies creating a community center to enter into a contract. *See* Act of June 12, 1969, 61st Leg., R.S.,ch 688, § 3, 1969 Tex. Gen. Laws 2010, 2012 (since repealed and codified as amended at Health & Safety Code Title VII)/ We believe this supports our conclusion that prior to the amendment, when Concho Valley and Central Plains were created, no contract was required.

version of section 3.01 applicable in 1989. See Act of June 20, 1987, 70th Leg., R.S., ch 956, § 3.01, 1987 Tex. Gen. Laws 3194, 3211 (since repealed and codified as amended at Health & Safety Code Title VII). Therefore, at the time the present lawsuit was filed, and only months following the date CRS alleges Concho Valley's offending conduct began, both centers had written contracts in place.

We decline to invalidate Concho Valley and Central Plains' 30--year history as legally created community centers for lack of written contracts at their inception.

2. Failure as Incorporated Entity

CRS next argues that because Central Plains was incorporated from 1969 ti 1996 as nonprofit corporation, it cannot be a valid community center. Basically, CRS contends that because governmental entities may not legally fund a corporation, and because the sponsoring governmental entities provide Central Plains with funding, Central Plains must not be a community center.

We are unpersuaded by this argument. Central Plains was incorporated pursuant to the Texas Non-Profit Corporation Act.[10] The summary-judgment evidence shows that Central Plains exercises only public functions for public purposes under the control of the State. Contrary to CRS's assertions, Central plains is governed by a board of trustees appointed by the participating local governmental entities creating the community center. Nothing in the statute authorizing the creation of community center indicates that a center may not be a nonprofit corporation properly formed under the Texas Non-Profit Corporation Act. We fail to see how Central Plains' nonprofit corporate status strips it of its identity as a governmental entity.

We reject CRS's contention that Concho Valley Central Plains are not valid community centers. Having so held, we turn to those causes of action asserted by CRS turning on the premise that the centers are invalid, and thus not governmental entities entitled to sovereign immunity.

RICO Claims

CRS contends in its tenth issue that the trial court erred in disposing

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[10] Tex. Rev. Civ. Stat. Amm. art. 1396-1.01-11.01 (West 1997 & Supp. 1999).

of its cause of action asserting RICO violations. As conceded by CRS in its brief to this Court, however, its RICO claims fail if this Court finds Concho Valley and Central Plains are legitimate community centers entitled to sovereign immunity from these claims. Moreover, CRS's RICO claims against appellees other that Concho Valley and Central Plains are premised on their alleged improper holding out of the community centers as legitimate. Because we reject CRS's contention that the centers are illegitimate, the RICO claims against all appellees fail accordingly. We hold that the trial court did not err in rendering judgment that CRS take nothing by its RICO cause of action.

Common-law Tort Claims

CRS next challenges the trial court's rejection of its common-law tort claims against all appellees, including claims of fraud, negligence, and tortious interference with contract. CRS's challenge fails for two reasons.

First, CRS provides no authority or argument to this Court that sovereign immunity has been waived; accordingly, CRS has failed to present anything for us to review, and the judgment should be affirmed on this ground alone. *See Rodriguez v. Morgan*, 584 S. W. 2d 558, 559(Tex. Civ. App.-Austin 1979, writ ref'd, n.r.e.). To the extent CRS asserts that sovereign immunity has been waived due to Concho Valley's and Central Plains' not being valid community centers, and therefore not governmental units, we have rejected this argument, as discussed above.

Second, appellees asserted grounds for summary judgment before the trial court that are not addressed by CRS on appeal. In granting summary judgment may be affirmed on any ground presented in appellees' motion. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W. 2nd 623, 625 (Tex. 1996). If summary judgment may have been granted on a ground not challenged, failure to address each theory that might support the trial court's rendition of summary judgment requires an affirmance. *See ,e.g., Holloway v. Starnes*, 840 S.W. 2d 14, 23 (Tex. app. - Dallas 1992, writ denied), *cert. denied*, 510 U.S. 828 (1993). Because CRS failed to assign error to all bases upon which the appellees moved for summary judgment on its common-law tort claims, complaint on appeal has been waived.

We hold that the trial court did not err in granting appellees a take-nothing judgment on CRS's common-law tort causes of action.

DTPA Claims

In its ninth issue presented, CRS asserts that the trial court erred in dismissing its DTPA claims against all appellees because they are not

shielded by sovereign immunity. We disagree. To the extent CRS contends that the appellees do not enjoy sovereign immunity because Central Plains and Concho Valley are "imposter" community centers, we have previously rejected this contention. Although CRS presents additional creative arguments as to why the DTPA waives sovereign immunity, none are viable. We hold there was no error.

Section 1983

In its eleventh issue, CRS complains that the trial court erred in dismissing its "section 1983" cause of action. *See* 42 U.S.C.A. § 1983(West 1994 & Supp. 1999). In granting summary judgment against CRS on this claim, the trial court did not specify the basis for its ruling; thus, the summary judgment may be affirmed on any ground presented in appellees' motion. *See Cincinnati Life*, 927 S.W.2nd at 625. Because CRS failed to assign error to all bases upon which the appellees moved for summary judgment on its section 1983 claims, complaint on appeal has been waived.

Injunction

CRS sought to enjoin Concho Valley from membership in the Texas Council, a nonprofit corporation created by community centers from throughout the state in a joint effort to effectuate the centers' responsibilities to mentally challenged Texans. CRS claims that Concho Valley lacks statutory authority to be a dues-paying member of a corporation such as the Council, and that Concho Valley's membership violates that portion of article 3, section 52 of the Texas Constitution prohibiting public entities from holding stock in a corporation. *See* Tex. Const. art. III, § 52.

Concho Valley counters that CRS lacks standing to seek and injunction to void its membership in the Council. CRS argues it has standing because it pays ad valorem taxes on five residential properties to Tom Green County and the City of San Angelo, which, in turn, fund Concho Valley. Alternatively, CRS argues it has standing as a citizen with a peculiar interest adversely affected by the actions of Concho Valley.

We agree with CRS that, generally speaking, a taxpaying citizen has standing to seek and injunction to enjoin public officials from the illegal expenditure of public funds. *See, e.g., Lara b. Williams*, 986 S.W.2d 310,341-15 (Tex. App.-Fort Worth 1999, pet filed) (citing *Osborne v. Keith*, 177 S.W. 2d 198,200 (Tex. 1944); *Hoffman v. Davis*, 100 S.W.2d 94.95 (Tex. 1937)). However, CRS does not seek to enjoin and expenditure by Tom Green County or the City of San Angelo to Concho Valley, or Concho Valley's expenditure to the Council in the form of membership

dues. Rather, CRS seeks to enjoin Concho Valley from remaining a member of the Council. Because CRS has not properly placed itself within the parameters of taxpayer standing, CRS's taxpayer status cannot in itself provide it with the necessary standing to maintain its request for injunction.

CRS argues alternatively that it has standing to seek injunctive relief as a citizen with a special interest adversely affected by Concho's membership in the Texas Council. The general rule is that standing to bring suit depends upon some interest peculiar to the person individually, and not a member of the general public. *See, e.g., Hunt v. Bass,* 664 S.W. 2d 323, 324 (Tex. 1984). More specifically, a person has standing to sue if:

(1) he has sustained, or is immediately in danger of sustaining, some *direct* injury as a result of the wrongful act of which he complains; (2) there is a *direct* relationship between the alleged injury and the claim to be adjudicated; (3) the plaintiff has a *personal* stake in the controversy; (4) the challenged action has caused the plaintiff some *injury in fact*, either economic, recreational, environmental, or otherwise; or (5) the plaintiff is an appropriate party to assert the public interest in the matter as well as his own interest. *Lake Medina Conservation Soc'y, Inc./Bexar-Medina-Atascosa Counties WCID No. 1 v. Texas Natural Resource Conservation Comm'n* 980 S.W.2d 511 (Tex. App.Austin 1998, pet. denied) (emphasis added); *see also Amerada Hess Corp. v. Garza,* 973 S.W.2d 667, 680 (Tex. App.-Corpus Christi 1996, no writ); *Billy B., Inc. v. Board of Trustees,* 717 S.W. 2d 156,158 (Tex. App.-Houston [1st Dist.] 1986, no writ).

CRS concedes that following the rendition of the final summary judgment in this case, it sold its licensed by which it had authorized to provide residential services to mentally retarded persons. CRS asserts that it nevertheless maintains standing to seek an injunction because it leases real property to a company that currently operates residential service centers on that property. In effect, CRS contends that, because it has a financial stake in the profitability of its lessee, who in turn is allegedly affected by Concho Valley's actions.

We conclude that the lessor/lessee relationship between CRS and its tenant does not create the special interest needed to support standing. Assuming Concho Valley's membership in the Council is improper, CRS, as landlord, has not sustained, and is not in danger of sustaining, a direct injury as a result of the membership. Further, the relationship between the possible injury to CRS and the allegedly improper membership of Concho Valley in Council is attenuated, at best. We certainly cannot say the

relationship in direct. Finally, CRS has no personal stake in Concho Valley's membership, and CRS can point to no injury in fact resulting from the membership.

According, we hold that CRS lacks standing to enjoin Concho Valley's membership in the Texas Council. Because lack of standing is a ground for dismissal rather than a take-nothing judgment on the merits, see Alexander v. City of Greenville, 585 S.W. 2d 333,334 (Tex. Civ. App.-Dallas 1979, writ ref'd, n.r.e.), the proper course for this Court is to vacate the portion of the summary judgment ordering that CRS take nothing by its request for injunctive relief, and to render judgment dismissing that portion of the cause in its entirety.

Persons with Mental Retardation Act

In its thirteenth issue presented, CRS urges this Court to find error in the trial court's disposal of its claims under the Persons with Mental Retardation Act ("PMRA"). See Health & Safety Code §§ 591.001-.025 (West 1992 & Supp. 1999) We decline.

The PMRA creates a statutory cause of action to redress violations of the rights of mentally retarded persons. *See id.* § 591.022. However, the right to sue is expressly limited to the person injured, the injured party's parents or guardian, or next friend. Id § 591.022 (d). CRS argues that it is a "person injured" and is therefore entitled to maintain suit. This precise contention has been advanced and rejected previously in *Develo-Cepts, Inc. v. City of Galveston,* 668 S.W.2d 790, 794 (Tex. App.-Houston[14th Dist.]1984, no writ) (PMRA "clearly restricts recovery to mentally retarded persons and to those entitled to bring suit in their behalf"). CRS's conclusory statement that *Develo-Cepts* is erroneous is not persuasive.

Because CRS had no right to sue under the PMRA, the trial court properly granted summary judgment disposing of this claim.

Claims Against Hale County

All of CRS's claims against Hale County are derivative in nature. CRS asserts that because Hale County participated in the creation, controlling, and funding of Central Plains, it is vicarious liable for the wrongdoings and liabilities of Central Plains. Because we have concluded that Central Plains is not liable under any theory advanced by CRS, there can be no vicarious liability imputed to Hale County. We hold that the trial court properly granted summary judgment for Hale County.

Interiocutory Default Judgment

CRS complains in issues three through six that the trial court erred in: (1) refusing to sign and interlocutory default judgment against Tom

Green County after such judgment was rendered on the record in open court; (2) holding a "show cause" hearing; and (4) making findings of fact at the "show cause" hearing.

As a prerequisite to presenting a n argument for appellate review, the record must show that the complaint was first made to the trial court. *See* Tex. R. App. P. 33.1(a). CRS failed to complain to the trial court regarding the default judgment issues presented, and failed to obtain a ruling on any complaint; therefore, CRS has not preserved error for appellate review.
See id.

Even if CRS had preserved error, and assuming CRS is correct that the trial court orally rendered and interlocutory default judgment, CRS's complaints are still without merit. The trial court had broad, virtually unlimited discretion to vacate an interlocutory order prior to its rendition of a final judgment. *See* Tex. R. Cive. P. 329b; *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83,84(Tex. 1993)(trial court has continuing power over interlocutory orders and may set them aside at any time before final judgment is entered). We find no error.

Procedural Rulings

In its final two issues presented, CRS complains of procedural ruling made in connection with the granting of summary judgment. By a scheduling order dated June 6, 1997, the trial court set deadlines after which the parties would not be permitted to file summary judgment argument or evidence. That order gave CRS until July 11, 1997, to complete summary judgment filings, and gave appellees until July 18, 1997. Appellees filed additional summary judgment argument and evidence on July 18. CRS filed and omnibus motion requesting the trial court to grant it leave to reply to the newly filed argument and evidence. The motion was denied. CRS asserts that the June 6 order improperly allowed appellees (as movants) the "last word" and that the trial court erred in denying its omnibus motion.

The record does not show that CRS complained to the trial court about the June 6 order or secured a ruling on any complaint; therefore, the point is waived. See Tex. R. App. P. 331.1. Furthermore, CRS provides no authority to this Court to support its assertion that it was error to allow movants the "last word". Error was therefore waived. *See, e.g., March v. Wallace*, 924 S.W.2d 423,425 (Tex. App.-Austin 1996, no writ). Even if CRS's contention had not been waived, we would still find it to be without merit. The order did not preclude CRS from responding to any additional summary judgment argument or evidence presented by appellees; rather, it

required CRS to seek leave of court before doing so. We do not find and abuse of discretion in the filing of the scheduling order.

As to the denial of the omnibus motion, while the trial court did deny the motion's general request for addition time to respond, the court granted CRS leave to file the only evidence specifically indentified by CRS as necessary to respond to appellee's July 18 filing. The remainder of the omnibus motion, in essence, was simply a request for a continuance for more time to gather potentially responsive evidence. The granting or denied of continuance is within the sound discretion of the trial judge. *See State v. .Crank*, 666 S.W.2d 91,94(Tex. 1984). The denial of a motion for continuance will not be disturbed unless the record shows a clear abuse of discretion. *See id.* Given the extended time frame within which the parties filed and responded to motions for summary judgment; the numerous motions for continuance that had previously been granted in this case; and the fact that CRS was granted leave to file eht evidence it contends was responsive to appellee's July 18 filing, we conclude that the trial court did not abuse its discretion by generally denying CRS's omnibus motion.

CONCLUSION

We hold that CRS lacks standing to seek to enjoin Concho Valley from future membership in the Texas Council; accordingly, we vacate that portion of the trial court's final summary judgment that CRS take nothing by its request for injunctive relief and render judgment dismissing that claim. Having found all remaining issues presented by CRS to be without merit, we affirm the summary judgment in all other respects.

J. Woodfin Jones, Justice

Before Justice Jones, Kidd and Patterson
Affirmed in Part; Vacated and Dismissed in Part
Filed: August 26, 1999
Do Not Publish

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED NOVEMBER 12, 1999

NO. 03-98-00022-CV

CONCHO RESIDENTIAL SERVICE, INC., Appellant

V.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority, And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER, Appellees.

APPEAL FROM 119TH DISTRICT COURT OF TOM GREEN COUNTY BEFORE JUSTICES JONES, KIDD AND PATTERSON AFFIRMED IN PART; VACATED AND DISMISSED IN PART ON MOTION FOR REHEARING -- OPINION BY JUSTICE JONES

THIS CAUSE came on to be heard on the record of the court below, and the smae being considered, because it is the opinion of this Court that there was no error in the trial court's summary judgment EXCEPT as to the rendition of judgment with respect to appellant's seeking to enjoin Concho Valley from future membership in the Texas Council: IT IS THEREFORE considered, adjudged and ordered that appellant's motion for rehearing is overruled; that the judgment of this court issued August 26, 1999, is withdrawn, and that the portion of the summary judgment with respect to Concho Residential Services, Inc. taking nothing by its request for injunctive relief is vacated, and judgment is rendered dismissing that claim. The remainder of the summary judgment is affirmed.

It is FURTHER ordered that the appeal, both in this court and the court below, except for the preparation of the Second Supplement to the Clerk's Record which will be paid by the appellees, both in this Court and the court below; and that this decision with a copy of the opinion herein delivered be certified below for observance.

THE SUPREME COURT OF TEXAS

March 9, 2000

Mr. Mark Brown
19 W. Beauregard
San Angelo, TX 76903

[and other counsel of record]

RE: Case Number 99-1269
Court of Appeals Number: 03-98-00022-CV
Trial Court Number: CV92-0444-B

Style: CONCHO RESIDENTIAL SERVICE, INC.
V.
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, in its capacity as an unincorporated association, its capacity as a mental retardation authority, and as a purported community MHMR center, JAMES YOUNG, ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,
John T. Adams, Clerk

THE SUPREME COURT OF TEXAS

April 27, 2000

Mr. Mark Brown
19 W. Beauregard
San Angelo, TX 76903

[and other counsel of record]

RE: Case Number 99-1269
Court of Appeals Number: 03-98-00022-CV
Trial Court Number: CV92-0444-B

Style: CONCHO RESIDENTIAL SERVICE, INC.
V.
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, in its capacity as an unincorporated association, its capacity as a mental retardation authority, and as a purported community MHMR center, JAMES YOUNG, ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Sincerely,
John T. Adams, Clerk